

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

999 18TH STREET- SUITE 300

DENVER, CO 80202-2466

Phone 800-227-8917

<http://www.epa.gov/region08>

DOCKET NO.: CWA-08-2006-0031

IN THE MATTER OF:

GOSNEY and SONS, INC.

BAYFIELD PIT

Bayfield, CO

RESPONDENT

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FINAL ORDER

Pursuant to 40 C.F.R. §22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondents are hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondents of this Consent Agreement and Final Order.

June 21, 2006
DATE

SIGNED
Robert E. Roberts
Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

Docket No CWA-08-2006-0031

IN THE MATTER OF:

Gosney and Sons, Inc.
Bayfield Pit
Bayfield, CO

**Complaint and
Consent Agreement**

Respondent

Complainant, United States Environmental Protection Agency, Region 8 (“EPA”), and the Gosney and Sons, Inc. (“Respondent”), by their undersigned representatives, hereby consent and agree as follows:

Introduction

1. The Administrator of the EPA has determined that an administrative penalty action is appropriate for the violations alleged below.
2. This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties set forth at 40 C.F.R. Part 22.
3. Therefore, EPA has jurisdiction over this matter pursuant to section 311(b)(6)(B)(i) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1321(b)(6)(B)(i), and is authorized to issue civil administrative complaints and assess civil penalties for violations of the CWA.

4. EPA and the Respondent (collectively referred to as the “parties”) have agreed to the settlement of this matter before the filing of a complaint as authorized by 40 C.F.R. § 22.13(b), and to execute this Complaint and Consent Agreement pursuant to 40 C.F.R. § 22.18(b)(2) and (3) for the purpose of simultaneously commencing and concluding this matter upon the issuance of a Final Order.

Allegations

4. Respondent is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business at 6699 County Road 521, Bayfield, Colorado, 81122..

5. Respondent is therefore a “person” within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

6. Respondent is the owner and/or operator of the Bayfield Pit sand and gravel operations (“facility”) in Bayfield, Colorado.

7. The Respondent is therefore an “owner and operator” of an “onshore facility” within the meaning of CWA sections 311(a)(6) and (10), 33 U.S.C. §§ 1321(a)(6) and (10).

8. The facility has a total above-ground oil storage capacity of approximately 13,785 gallons.

9. The facility is located adjacent to the Pine River Canal which flows to the Los Pinos River which are “navigable waters” and “waters of the United States” within the meaning of section 502(7) of the Act, 33 U.S.C § 1362(7), and 40 C.F.R. § 110.1.

10. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility

(i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by...the Administrator.

11. As alleged herein and pursuant to section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R § 19.4, Respondent is liable for civil penalties up to \$11, 000 per day during which the violations continues, up to a maximum total of \$32,500 for all violations.

12. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil...from vessels and from onshore and offshore facilities, and to contain such discharges...”

13. EPA promulgated the oil pollution prevention regulations, set forth at 40 C.F.R. part 112. 40 C.F.R. § 112.1(b) states that the requirements of part 112 apply: “to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines...”

14. The facility is a non-transportation onshore facility which, due to its location, may reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline

that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

15. The facility is subject to the oil pollution prevention requirements of 40 C.F.R. part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations. This regulation (40 C.F.R. § 112.3) requires that owners or operators of onshore and offshore facilities prepare a Spill Prevention, Control, and Countermeasure (“SPCC”) plan in writing, and in accordance with applicable sections of part 112 including, but not limited to sections 112.7 and 112.8.

16. On or about September 14 and 15, 2005, an authorized EPA inspector entered the facility with the Respondent’s consent to determine the facility’s compliance with the requirements of the Oil Pollution Prevention Regulations (also known as Spill Prevention Control and Countermeasure Plan or SPCC regulations).

17. The facility was determined to have a total capacity of approximately 13,785 gallons.

18. At the time of the inspection, no SPCC Plan had been prepared by Respondent for the facility as required by 40 C.F.R. § 112.3.

19. At the time of the inspection, the following SPCC implementation measures were found to be deficient at the facility:

Failure to prepare and/or implement a facility SPCC Plan as required by 40 C.F.R. ' 112.3.

No secondary containment for some bulk storage containers in violation of 40 C.F.R. ' 112.8(c)(2).

Visible discharges and accumulations of oil not removed as required by 40 C.F.R. ' 112.8(c)(10).

Mobile or portable containers not located or positioned to prevent a discharge as required by 40 C.F.R. ' 112.8(c)(11).

No secondary containment for mobile or portable containers in violation of 40 C.F.R. ' 112.8(c)(11).

20. Additionally, the SPCC Plan, when submitted on February 4, 2005, was deficient in the following areas:

The regulations as set forth in 40 C.F.R. ' 112.7 regarding the correct sequencing or a cross-reference for the plans, is not being followed.

Inadequate facility diagrams in violation of 40 C.F.R. ' 112.7(a)(3).

Inadequate description of the type of oil in each container and its storage capacity in violation of 40 C.F.R. ' 112.7(a)(3)(i).

Inadequate discussion of discharge prevention measures in violation of 40 C.F.R. ' 112.7(a)(3)(ii).

Inadequate discussion of discharge or drainage controls in violation of 40 C.F.R. ' 112.7(a)(3)(iii).

Inadequate discussion of countermeasures for discharge discovery, response, and cleanup as required by 40 C.F.R. ' 112.7(a)(3)(iv).

No discussion of the methods of disposal of recovered materials from a spill in accordance with applicable legal requirements as required by 40 C.F.R. ' 112.7(a)(3)(v).

Inadequate contact list and phone numbers as required by 40 C.F.R. ' 112.7(a)(3)(vi).

Inadequate discharge notification form as required by 40 C.F.R. ' 112.7(a)(4).

Inadequate discharge prediction in violation of 40 C.F.R. ' 112.7(b).

Inadequate discussion of secondary containment as required by 40 C.F.R. ' 112.7(c).

No discussion of secondary containment for loading/unloading area in violation of 40 C.F.R. ' 112.7(c).

Inadequate written procedures for conducting inspections as required by 40 C.F.R. ' 112.7(e).

No discussion of the gates being locked, or alternative security measure when the facility is not in production or is unattended, in violation of 40 C.F.R. ' 112.7(g)(1).

Inadequate description of lighting, or alternative security measure commensurate with the type and location of the facility in violation of 40 C.F.R. ' 112.7(g)(5).

No discussion of facility drainage systems from undiked areas being designed to prevent a discharge as required by 40 C.F.R. ' 112.8(b)(3).

Inadequate description of secondary containment for bulk storage containers in violation of 40 C.F.R. ' 112.8(c)(2).

No procedure to keep adequate records of drainage events as required by 40 C.F.R. ' 112.8(c)(3)(iv).

No discussion of secondary containment for mobile or portable containers in violation of 40 C.F.R. ' 112.8(c)(11).

Inadequate Certification of the Applicability of Substantial Harm Certification as required by 40 C.F.R. § 112.20.

21. Respondent failed to prepare and implement an SPCC plan in accordance with the regulations at 40 C.F.R. §§ 112.7 and 112.8 as required by 40 C.F.R. § 112.3. Respondent's failure to prepare and implement an SPCC plan for the facility in accordance with the regulations at 40 C.F.R §§ 112.7 and 112.8 constitutes a violation of C.F.R § 112.3 and section 311(j)(1)(c), 33 U.S.C. § 1321(j)(1)(c).

22. Respondent submitted a complete SPCC plan in September 2005 and constructed adequate secondary containment in November 2005.

Settlement

23. Respondent admits the jurisdictional allegations contained herein and neither admits nor denies the specific factual allegations and violations alleged herein.

24. Respondent waives the right to a hearing before any tribunal to contest any issue of law or fact set forth in this Complaint and Consent Agreement.

25. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondent agree that entry of this Complaint and Consent Agreement without further litigation is the most appropriate means of resolving this matter.

26. This Complaint and Consent Agreement, upon incorporation into a Final Order, applies to and is binding upon EPA and upon the Respondent and Respondent's employees.

27. This Complaint and Consent Agreement contains all terms of the settlement agreed to by the parties.

Civil Penalty

28. Pursuant to section 311(b) of the CWA, 33 U.S.C. § 1321(b), EPA has determined that an appropriate civil penalty to settle this action is seven thousand dollars (\$7,000.00).

29. Respondent consents, for the purpose of settlement, to the issuance of a Complaint and Consent Agreement and to the payment of the civil penalty cited in the foregoing paragraph.

30. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

31. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 61st day from the date of the final order, and each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the date the Final Order is issued. Payments are first applied to outstanding handling charges, 6%

penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

32. Respondent agrees that this penalty shall never be claimed as a federal or other tax deduction or credit.

33. Within sixty (60) calendar days of receipt of the Final Order issued by the Regional Judicial Officer, Respondent shall pay the agreed upon civil penalty of seven thousand dollars (\$7,000.00) by remitting a cashier's or certified check for that amount, payable to **"Oil Spill Liability Trust Fund,"** with the docket number and name of the facility written on the check, to:

Donna Inman
Technical Enforcement Program (8ENF-UFO)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
(303) 312-6201

The check shall reference the Respondent's name and facility address and the EPA Docket Number of this action. A copy of the check shall be sent simultaneously to:

Ms. Tina Artemis
Regional Hearing Clerk, Mail Code: 8RC
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

and

Marc Weiner
Enforcement Attorney, Mail Code 8ENF-L
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

General Provisions

34. This Complaint and Consent Agreement shall not relieve Respondent of the obligation to comply with all applicable provisions of federal, state or local law.

35. Failure by Respondent to comply with any of the terms of this Complaint and Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

36. Nothing in this Complaint and Consent Agreement shall be construed as a waiver by the U.S. EPA of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this Complaint and Consent Agreement.

37. Each undersigned representative of the parties to this Complaint and Consent Agreement certifies that he or she is fully authorized by the party represented to execute and bind the parties to its terms and conditions.

38. The parties agree to submit this Complaint and Consent Agreement to the Regional Judicial Officer with a request that it be incorporated into a Final Order.

39. This Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the violations alleged in this Complaint and Consent Agreement.

40. This Complaint and Consent Agreement resolves Respondent's liability for federal civil penalties under sections 311(b) of the CWA, 33 U.S.C. § 1321(b), for the alleged violations contained herein. This Complaint and Consent Agreement shall not in any case affect EPA's

right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

41. Each party shall bear its own costs and legal fees in connection with all issues associated with this Complaint and Consent Agreement.

GOSNEY AND SONS, INC.
Respondent

Date: 6/12/06 By: Don L. Gosney, President

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 8, Complainant

Date: 6/16/06 By: Timothy Osag for/
Elisabeth Evans
Director
Technical Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

Date: 6/15/06 By: SIGNED
Michael T. Risner, Director
David Janik, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

Date: 6/15/06 By: SIGNED
Marc Weiner, Enforcement Attorney
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMPLAINT/CONSENT AGREEMENT/FINAL ORDER** in the matter **GOSNEY and SONS, INC., BAYFIELD PIT, DOCKET NO.: CWA-08-2006-0031** was filed with the Regional Hearing Clerk on June 21, 2006.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Marc Weiner, Enforcement Attorney, U. S. EPA – Region 8, 999 18th Street, Suite 300, Denver, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on June 23, 2006, to:

Mark Mathews, Esq.
Brownstein, Hyatt & Farber, P.C.
410 Seventeenth Street
Twenty-Second Floor
Denver, CO 80202-4437

And

U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

June 23, 2006

SIGNED _____

Tina Artemis
Regional Hearing Clerk

**THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE
JUNE 23, 2006.**

